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No. 01-223

In the Supreme Court of the United States

CONSUMER FEDERATION OF AMERICA, ET AL., PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Congress has authorized the Federal Communications Commission "to prescribe rules and regulations establishing reasonable limits on the number of cable [television] subscribers a person is authorized to reach through cable systems owned by such person, or in which such person has an attributable interest," 47 U.S.C. 533(f)(1)(A). The question presented is:

Whether a Federal Communications Commission's rule, which limits the number of cable television subscribers that a cable operator may serve to no "more than 30% of all multichannel-video programming subscribers nationwide," 47 C.F.R. 76.503(a), exceeds the Commission's authority under 47 U.S.C. 533(f)(1)(A).

PARTIES TO THE PROCEEDINGS

Petitioners, intervenors below, are the Consumer Federation of America, Consumers Union, Center for Media Education, Association of Independent Video and Filmmakers, National Association of Artists, National Alliance for Media Arts and Culture, Office of Communication of the United Church of Christ, Inc., and National Council of Senior Citizens.

Respondents are Time Warner Entertainment Company, L.P., Bell South Telecommunications, Inc., Bell Atlantic Telephone Companies, AT&T Corporation, Cox Communications, Inc., and U.S. WEST, Inc.

Pursuant to this Court's Rule 12.6, the Federal Communications Commission and the United States of America are also respondents in this Court.

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OPINIONS BELOW

The opinion of the court of appeals (1 Pet. App. 1-29) is reported at 240 F.3d 1126. The rules under review were adopted in *In re Implementation of Sections 11 and 13 of the Cable Television Consumer Protection and Competition Act of 1992, Horizontal and Vertical Ownership Limits*, Second Report and Order, 8 F.C.C.R. 8565 (1 Pet. App. 53-96), *In re Implementation of Section 11(c) of the Cable Television Consumer Protection and Competition Act of 1992, Horizontal Ownership Limits*, Memorandum Opinion and Order on Reconsideration and Further Notice of Proposed Rulemaking, 13 F.C.C.R. 14,462 (1 Pet. App. 114-180), and *In re Implementation of Section 11(c) of the Cable*

Television Consumer Protection and Competition Act of 1992, Horizontal Ownership Limits, Third Report and Order, 14 F.C.C.R. 19,098 (2 Pet. App. 254-311).

JURISDICTION

The court of appeals entered its judgment on March 2, 2001. A petition for rehearing was denied on May 4, 2001 (1 Pet. App. 30-31). The petition for a writ of certiorari was filed on August 2, 2001. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Cable Television Consumer Protection and Competition Act of 1992 (1992 Cable Act), Pub. L. No. 102-385, 106 Stat. 1460, was the product of "three years of hearings on the structure and operation of the cable television industry." *Turner Broad. Sys., Inc.* v. *FCC*, 512 U.S. 622, 632 (1994). In express legislative findings, Congress found that "the cable television industry ha[d] become a dominant nationwide video medium," with more than "60 percent of the households with televisions" subscribing. 1992 Cable Act § 2(a)(3), 106 Stat. 1460, *reprinted in* 47 U.S.C. 521 note. Congress further determined that, "[f]or a variety of reasons, including local franchising requirements and the extraordinary expense of constructing more than one cable television system to serve a particular geographic area, most cable television subscribers have no opportunity to select between competing cable systems." 1992 Cable Act § 2(a)(2), 106 Stat. 1460. "The result," Congress found, "is undue market power for the cable operator as compared to that of consumers and video programmers." *Ibid.*

Congress also found that the "cable industry has become highly concentrated." 1992 Cable Act § 2(a)(4), 106 Stat. 1460, *reprinted in* 47 U.S.C. 521 note. Con-

gress expressed concern that "[t]he potential effects of such concentration are barriers to entry for new programmers and a reduction in the number of media voices available to consumers." *Ibid.* Accordingly, in the 1992 Cable Act, Congress required the Federal Communications Commission (FCC) "to prescribe rules and regulations establishing reasonable limits on the number of cable subscribers a person is authorized to reach through cable systems owned by such person, or in which such person has an attributable interest." 47 U.S.C. 533(f)(1)(A). Congress intended that the subscriber limit provision would decelerate horizontal integration in the cable television industry.

Pursuant to that statutory authorization, the FCC promulgated regulations implementing the 1992 Cable Act's subscriber limits provision. The FCC's regulations provide generally that "no cable operator shall serve more than 30% of all multichannel-video programming subscribers nationwide through multichannel video programming distributors owned by such operator or in which such cable operator holds an attributable interest." 47 C.F.R. 76.503(a).[1]

2. Respondents Time Warner Entertainment Company and AT&T Corporation, two of the nation's larg-

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[1] A "multichannel video programming distributor" is a person "who makes available for purchase, by subscribers or customers, multiple channels of video programming," and includes a "cable operator" as well as a "direct broadcast satellite service." 47 U.S.C. 522(13) (1994 & Supp. V 1999). See also 47 C.F.R. 76.503(e) (parallel definition of "multichannel-video programming subscribers"). An "attributable interest" is defined, by regulation, as including "[a]ctual working control" of an entity, as well as "partnership and direct ownership interests and any voting stock interest amounting to 5% or more of the outstanding voting stock of a corporation." 47 C.F.R. 76.501 nn.1, 2(a)

est cable operators, filed a petition for review challenging the FCC's subscriber limit rule in the United States Court of Appeals for the District of Columbia Circuit. The court of appeals held (1 Pet. App. 1-29) that the FCC's subscriber limit rule was, "[o]n the record before [it], * * * in excess of statutory authority," and remanded the rule to the agency "for further consideration," *id.* at 17, 22.

The court of appeals recognized, as it previously had in upholding the constitutionality of the subscriber limit provision of the underlying statute (see *Time Warner Entertainment Co.* v. *United States*, 211 F.3d 1313, 1319-1320 (D.C. Cir. 2000), cert. denied, 121 S. Ct. 1167 (2001)), that the government's interests in promoting "diversity in ideas and speech" and preserving competition are substantial. 1 Pet. App. 6. The court further held that the FCC was "on solid ground in asserting authority to be sure that no single company could be in a position singlehandedly to deal a programmer a death blow." *Id.* at 8. "If [the] interest in diversity is to mean anything in this context," the appeals court stated, "the government must be able to ensure that a programmer ha[s] at least two conduits through which it can reach the number of viewers needed for viability—independent of concerns over anticompetitive conduct." *Ibid.* The appeals court also "[a]ssum[ed] the validity of the premises supporting the FCC's conclusion" that the average cable programmer needs an "open field" of 40% of the market to be economically viable. *Id.* at 8-9.

The court of appeals, however, rejected (1 Pet. App. 7) as unsubstantiated the FCC's determination that a 30% cap on subscriptions was necessary to ensure that a programmer would have the required open field of 40% of the market in the event that "the two largest cable companies deny carriage, acting 'individually or

collusively.'" The court of appeals found (*id.* at 9-11) no "record support for inferring a non-conjectural risk of collusive rejection." In so holding, the court acknowledged that the 1992 Cable Act "plainly alludes to the *possibility* of collusion when it authorizes regulations to protect against '*joint* actions by a group of operators of sufficient size.'" *Id.* at 9 (citing 47 U.S.C. 533(f)(2)(A) (emphasis added)). But the court held (*ibid.*) that the statutory language is "not itself a congressional finding of actual or probable collusion." The court further acknowledged the "economic commonplace that, all other things being equal, collusion is less likely when there are more firms," but it found that, "by itself," that observation "lends no insight into the question of what the appropriate horizontal limit is," because it "will always be true, although marginally less so for each additional firm." *Id.* at 10.[2]

The court of appeals also stated that "the assessment of a real risk of anti-competitive behavior—collusive or not—is itself dependent on an understanding of market power," and that "normally a company's ability to exercise market power depends not only on its share of the market, but also on the elasticities of supply and demand, which in turn are determined by the *availability*

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[2] The court of appeals did not, however, "foreclose the possibility that there are theories of anti-competitive behavior other than collusion that may be relevant to the horizontal limit and on which the FCC may be able to rely on remand." 1 Pet. App. 11. For example, the court stated, a single cable operator, "acting alone rather than 'jointly,' might perhaps be able to" engage in anti-competitive acts "while serving somewhat less than * * * 60% of the market * * * and the risk might justify a prophylactic limit under the statute." *Ibid.* The court emphasized, however, that "the FCC made no attempt to justify its regulation on these grounds." *Ibid.*

of competition." 1 Pet. App. 12-13. In light of "the substantial changes in the cable industry since publication of the *Third Report* in 1999," the appeals court stated that, "in revisiting the horizontal rules the Commission will have to take account of the impact of DBS [direct broadcast satellite] on that market power." *Id.* at 13.

Finally, the court of appeals rejected the FCC's alternative contention that a 30% limit was necessary to ensure that independent decisions by two large cable companies could not reduce a programmer's open field below the requisite 40% threshold. 1 Pet. App. 13-17. The court emphasized that the statute requires the FCC, in prescribing its implementing rules, "to ensure that no cable operator or group of cable operators can unfairly impede, either because of the size of any individual operator or because of joint actions by a group of operators of sufficient size, the flow of video programming from the video programmer to the consumer." *Id.* at 15 (quoting 47 U.S.C. 533(f)(2)(A)). The court stated that it was unable to "see how the word unfair could plausibly apply to the legitimate, independent editorial choices of multiple [cable operators]." *Ibid.*

In sum, while the court of appeals acknowledged that "[t]he 'interrelated interests' of promoting diversity and fair competition run throughout the 1992 Cable Act's various provisions," 1 Pet. App. 15-16, it held that "Congress's *primary* concern" underlying the subscriber limits "is 'fair' competition," *id.* at 16. The court accordingly adopted a reading of the statute "that sharply confines the authority to regulate solely in the interest of diversity." *Ibid.* Because "the Commission has pointed to nothing in the record supporting a non-conjectural risk of anticompetitive behavior," the court

"reverse[d] and remand[ed] with respect to the 30% rule." *Id.* at 17.[3]

3. In the wake of the court of appeals' decision, the FCC recently initiated a rulemaking to review its subscriber limit rule and to "adopt regulations that are appropriate given the market power of cable operator[s] in today's dynamic and changing MVPD [multichannel video programming distributor] marketplace." *In re Implementation of Section 11 of the Cable Television Consumer Protection and Competition Act of 1992*, Further Notice of Proposed Rulemaking, FCC 01-263, 2001 WL 1104549, para. 44 (Sept. 21, 2001).

ARGUMENT

While we disagree with the court of appeals' judgment and cramped analysis of the FCC's authority to ensure a diversity of views and to promote fair competition in the cable industry, we do not believe that review by this Court is warranted at this time. The court of appeals' decision does not foreclose the FCC's 30% subscriber limit; it simply requires greater record substantiation for the FCC's marketplace assumptions. To that end, the FCC has recently initiated a rulemaking proceeding to review its subscriber limit rules in light of the changes that have occurred in the marketplace since they were first adopted. The pendency

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[3] In addition to the FCC's subscriber limit rule, the court of appeals addressed (1 Pet. App. 17-29) the validity of the agency's channel occupancy and attribution rules (see 47 C.F.R. 76.504(a) (generally prohibiting a cable operator from devoting "more than 40 percent of its activated channels to the carriage of national video programming services owned by the cable operator or in which the cable operator has an attributable interest"); 47 C.F.R. 76.501 nn.1, 2(a) (defining attributable interest)). Petitioners have not sought review of those rulings.

of that rulemaking proceeding would make review by this Court premature and potentially unnecessary.

1. Contrary to the court of appeals' decision (1 Pet. App. 1-17), the subscriber limit rule falls comfortably within the authority vested in the FCC by the 1992 Cable Act. Congress specifically directed the FCC to promulgate subscriber limits on cable operators both to promote a diversity of views and to further fair competition in the information marketplace. See *Time Warner Entertainment Co.* v. *United States*, 211 F.3d 1313, 1319-1320 (D.C. Cir. 2000), cert. denied, 121 S. Ct. 1167 (2001); cf. *Turner Broad. Sys., Inc.* v. *FCC*, 520 U.S. 180, 189 (1997). In particular, the statute requires that the FCC's subscriber limit rule not only "ensure that no cable operator or group of cable operators can unfairly impede, either because of the size of any individual operator or because of joint actions by a group of operators of sufficient size, the flow of video programming from the video programmer to the consumer," 47 U.S.C. 533(f)(2)(A), but also avoid "limitations which would impair the development of diverse and high quality video programming," 47 U.S.C. 533(f)(2)(G).

The statute's findings likewise reflect Congress's dual concerns that the cable industry's highly concentrated market structure could give rise to "barriers to entry for new programmers," as well as "a reduction in the number of media voices available to consumers." 1992 Cable Act § 2(a)(4), 106 Stat. 1460, *reprinted in* 47 U.S.C. 521 note. Indeed, Congress could not have been more clear when it adopted a "Statement of Policy" expressing its desire that the FCC's regulations both "ensure that cable television operators do not have undue market power vis-a-vis video programmers and consumers," and "promote the availability to the public

of a diversity of views and information through cable television and other video distribution media." 1992 Cable Act §§ 2(b)(1), 2(b)(5), 106 Stat. 1463, *reprinted in* 47 U.S.C. 521 note. The FCC's subscriber limit rule directly advances the congressional goals of promoting both diversity and fair competition.

a. By capping subscription levels at 30%, the rule ensures that two large cable operators, either collusively or independently, cannot deny a video programmer access to that 40% of the market that the FCC determined was necessary to launch a viable independent network. The court of appeals nevertheless invalidated the rule on the ground that the FCC had "put forth no evidence at all that indicates the prospects for collusion," even among two dominant cable operators. 1 Pet. App. 11. But the 1992 Cable Act itself expressly anticipates the possibility of collusion among large cable operators: the Act instructs the FCC to protect, through its regulation, against "joint actions by a group of operators of sufficient size." 47 U.S.C. 533(f)(2)(A).

In addition, as the court of appeals acknowledged, it is an "economic commonplace that, all other things being equal, collusion is less likely when there are more firms." 1 Pet. App. 10. See also *FTC* v. *H.J. Heinz Co.*, 246 F.3d 708, 715 (D.C. Cir. 2001) ("Merger law 'rests upon the theory that, where rivals are few, firms will be able to coordinate their behavior, either by overt collusion or implicit understanding.'"). Indeed, to the extent that the court of appeals' opinion may be interpreted as insisting on specific prior evidence of anti-competitive conduct, it would be inconsistent with the court's earlier determination that the subscriber limit is a "structural limitation" that was intended to "add[] a prophylaxis to the law." *Time Warner*, 211 F.3d at 1320. In the end, the court of appeals' decision

pays scant heed to this Court's admonition that the FCC's predictive judgments do not require "complete factual support in the record," and that "a forecast of the direction in which future public interest lies necessarily involves deductions based on the expert knowledge of the agency." *FCC* v. *National Citizens Comm. for Broad.*, 436 U.S. 775, 814 (1978); accord *FCC* v. *WNCN Listeners Guild*, 450 U.S. 582, 594-595 (1981).

b. Furthermore, the court of appeals' decision overlooks that the 1992 Cable Act also was intended to promote a diversity of viewpoints. By ensuring that the two largest cable firms do not have the power to deny a new video programmer access to an economically critical portion of the market, the FCC's subscriber limit rule promotes the viability of new video programmers and thereby advances the government's interest in promoting "diverse * * * video programming." 47 U.S.C. 533(f)(2)(G); see also 1 Pet. App. 14 ("Everything else being equal, each additional 'voice' may be said to enhance diversity."). Thus, even if competitive concerns were alone insufficient to support the FCC's 30% cap, the 1992 Cable Act's interest in promoting diversity, singly or in combination with those competitive concerns, should have sufficed to sustain the rule.

The court of appeals found (1 Pet. App. 14) the promotion of diversity to be an insufficient justification for the rule because, "at some point * * * the marginal value of such an increment in 'diversity' would not qualify as an 'important' governmental interest," such as "moving from 100 possible combinations to 101." That concern about de minimis enhancements in diversity, however, has no relevance here. The FCC's subscriber rule establishes a foundational level of diversity by ensuring that there will be at least four market

participants, no two of which can foreclose long-term entry by an independent programmer, and thus prevents the two largest cable distributors from completely dominating the market. The court's ability to imagine hypothetical situations where the incremental increase in diversity might not justify a regulation thus provides no basis for invalidating a regulation whose actual and foreseeable operation substantially enhances the congressional goal of diversity.

Finally, the court of appeals held (1 Pet. App. 15-17) that the FCC's regulation paid insufficient heed to Congress's concern about "joint" actions by operators that impede competition. See 47 U.S.C. 533(f)(2)(A) (FCC must ensure that "no cable operator or group of cable operators can unfairly impede, either because of the size of any individual operator or because of joint actions by a group of operators of sufficient size, the flow of video programming from the video programmer to the consumer."). But that provision is merely one of seven objectives—including the promotion of diverse programming—that Congress intends the subscriber limit rule to advance. See 47 U.S.C. 533(f)(2)(A)-(G). The court of appeals thus erred in treating Congress's concerns regarding competition as eclipsing other comparably important legislative considerations.

2. Notwithstanding our disagreement with the court of appeals' decision, this Court's review is not warranted at this time. First, the court's decision was limited (1 Pet. App. 17) to "the record before [it]." The decision thus leaves open the possibility that the same or similar regulatory limits will be sustained if the FCC creates a stronger record of an actuality or probability of collusion or other anti-competitive conduct, or offers a more extensive explanation for its assumptions about

marketplace behavior. *Ibid.* Relatedly, the court of appeals did "not foreclose the possibility that there are theories of anti-competitive behavior other than collusion that may be relevant to the horizontal limit and on which the FCC may be able to rely on remand." *Id.* at 11 (suggesting that a single dominant operator might be able to engage in anti-competitive acts against programmers even if it lacked the power to block entry entirely).

Second, as the court of appeals recognized (1 Pet. App. 13), there have been "substantial changes in the cable industry since publication of the *Third Report* in 1999." In its latest report on competition in the video programming marketplace, the FCC found that "[b]etween June 1999 and June 2000, the number of [direct broadcast satellite] subscribers grew from 10.1 million households to almost 13 million households," or "nearly three times the cable subscriber growth rate." *In re Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Seventh Annual Report, FCC 01-1, 2001 WL 12938, para. 8 (Jan. 8, 2001). At the end of that period, direct broadcast satellite subscribers represented 15.4% of all multichannel video programming subscribers. *Ibid.* The impact of direct broadcast satellite growth on the market power of cable operators and other changes in the cable industry have substantial relevance to the FCC's reevaluation of its current subscriber limit rule, and it would be premature for this Court to review the FCC's rule in the absence of a fully developed record regarding the impact of those recent developments on the market power of cable operators.

Third, in response to both the court of appeals' decision and significant changes in the cable marketplace, the FCC recently initiated a rulemaking to review its

subscriber limit rule and to "adopt regulations that are appropriate given the market power of cable operator[s] in today's dynamic and changing MVPD marketplace." *In re Implementation of Section 11 of the Cable Television Consumer Protection and Competition Act of 1992*, Further Notice of Proposed Rulemaking, FCC 01-263, 2001 WL 1104549, para. 44 (Sept. 21, 2001). Among other issues, the Notice of Proposed Rulemaking seeks "comment on market conditions and changes that have taken place since the 1992 [Cable] Act," *id.* para. 7, including "comment on the impact of [direct broadcast satellite's] presence on cable operators' market power," *id.* para. 22. The notice specifically asks for "comment and economic evidence that would support or refute the Commission's earlier conclusions" that underlay its subscriber limit rule and that troubled the court of appeals. *Id.* para. 56. The Notice of Proposed Rulemaking, moreover, requests comments on whether the FCC should add a "safe harbor" provision to the rule, which would suspend the ownership limit "so long as a sufficient level of effective competition was maintained." *Id.* paras. 68, 72; see also 66 Fed. Reg. 51,905, 51,906 (Oct. 11, 2001) (synopsis of further notice of proposed rulemaking).

In light of the pending rulemaking proceeding, review by this Court is not warranted at this time. If the FCC reaffirms the rule essentially in its present form, interested parties will be free to seek judicial review of the rule on the basis of the record generated in the new rulemaking, rather than the earlier, narrower record addressed by the court of appeals' decision. If, on the other hand, the FCC significantly modifies the rule in light of the information gathered during the rulemaking, the challenge to the rule in its current form will likely be mooted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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